Alterman Transport Lines, Inc. *and* Food Drivers, Helpers and Warehousemen Employees Local 500 a/w International Brotherhood of Teamsters, AFL–CIO[1] *and* Richard E. Tablas *and* Perry Rease. Cases 4–CA–19364, 4–CA–19696, and 4–CA–19718

September 30, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On December 13, 1991, Administrative Law Judge Thomas R. Wilks issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, cross-exceptions and a supporting brief, and the Respondent filed a brief in answer to the cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Although we agree with the judge's portrayal of the facts and testimony in this proceeding, we correct the following inadvertent errors which do not affect the result: at sec. III, par. 4, the location of one of the Respondent's break bulk terminals should read Atlanta, Georgia; at par. 5, the Respondent did not assume England's LTL business; at par. 7, the Respondent planned to establish Bridgeport as a break bulk terminal; at par. 9, the Respondent did not have a Pittsburgh terminal; at par. 17, the meeting at Bennett's home took place on November 10, and the petition was filed on October 28, 1990, in Case 4–RC–17494; at par. 32, Fischer's November 7 conversation was with Lee; and at par. 77, Fischer testified that he spoke with Van Horn on May 15, and August 17 was the intended date for the hearing in this proceeding, rather than for the election.

[3] In adopting the judge's dismissal of the allegation that in a conversation with employee Fischer Respondent's president, Sidney Alterman, promised to remedy employee complaints, we note, contrary to the judge's finding, that Alterman did not testify concerning this aspect of the conversation. We rely instead on the judge's discrediting of Fischer's testimony regarding this discussion. We agree with the judge that employee Tablas' testimony that he overheard Alterman state that he was unaware of the drivers' problems but ''we can get together and work them out'' does not demonstrate a clear promise to remedy specific complaints.

We agree with the judge's conclusions that the Respondent reduced the hours of its local drivers in retaliation for the union activities of its employees and that employees Rease and Tablas were constructively discharged. Having reviewed the documents entered into the record by the Respondent, we agree with the judge that these documents, coupled with the testimony of the Respondent's witnesses, fail to satisfy the Respondent's burden to demonstrate that this decrease in work hours would have occurred in the absence of the employees' union activity. See *Migali Industries*, 285 NLRB 820, 824 (1987).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Alterman Transport Lines, Inc., Burlington, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Barbara A. O'Neill, Esq., for the General Counsel.
Peter D. Walther, Esq., of Jenkentown, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. This matter was tried before me at Philadelphia, Pennsylvania, on August 7, 8, and 9, 1991, pursuant to a consolidated complaint issued by the Regional Director for Region 4 on May 31, 1991. That complaint was based on charges filed in Case 4–CA–19364 by Food Drivers, Helpers and Warehousemen Employees Local 500 a/w International Brotherhood of Teamsters, AFL–CIO (Union) on November 14, 1990; and in Cases 4–CA–19696 and 4–CA–19718, respectively, by individuals Richard Tablas and Perry Rease on April 11 and 18, 1991, against Alterman Transport Lines, Inc. (Respondent). The consolidated complaint alleged 8(a)(1) violations of the Act consisting of multiple incidents of coercive interference with Respondent's employees rights to obtain membership in, activity on behalf of and representation by the Union. The complaint also alleged violations of Section 8(a)(1) and (3) of the Act consisting of the discharge of dock worker and lead leader Gordon Bennett for pretextual reasons and the reduction of work hours assigned to its drivers and dock loaders at the Burlington terminal which, in turn, caused the constructive discharge of local drivers Richard Tablas and Perry Rease in order to discourage its employees' union membership, activities and to frustrate union representative efforts at the Burlington terminal.

Respondent's timely filed answer denied the allegations of unlawful conduct and thereafter took a position that Bennett (whom it alleges was an unprotected supervisor) had been discharged for misconduct in the performance of his duties, and that a drastic decline in the shipments in and out of the Burlington terminal caused the reduction of available pickup and delivery duties for the local drivers assigned to that terminal. The General Counsel contends that the work, that was available for the geographical area covered by the Burlington terminal after union representation efforts commenced for the local drivers and dock workers and a representation petition filed with the Regional Director, was discriminatorily assigned to the long distance distance over-the-road drivers, including those servicing other Respondent terminals.

At the trial, the parties were given full opportunity to adduce relevant testimony and evidence which encompassed a

massive exhibit of shipping records. All parties have requested and I have taken administrative notice of the transcript of the now deferred representation case, Case 4–RC–17494 which contains 2 days' worth of testimony of witnesses common to both proceedings.

All parties were given opportunity to set forth oral statements of position in the record, and they have also filed post-trial briefs which, after an extension of time was granted, were received on September 23, 1991.

On the entire record of this case, including my evaluation of extensive documentary evidence and disputed testimony of witnesses and their demeanor, and consideration of exhaustive, lengthy but very well written briefs, I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

The Respondent is, and has been at all times material, a Florida corporation engaged in the interstate transportation of refrigerated perishables with, its principal place of business located in Opa Locka, Florida. The Respondent's Burlington, New Jersey terminal (the Burlington terminal) is the facility involved in this proceeding. During the past year, in the course and conduct of its operations, the Respondent derived gross revenues in excess of $50,000 for transporting refrigerated perishables from its Burlington terminal directly to points outside the State of New Jersey.

It is admitted, and I find, that the Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

It is admitted, and I find, that the Union is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

III. FACTS

A. *Background*

Respondent transports food and other temperature-sensitive items which require the use of temperature-controlled trailers and storage facilities capable of holding frozen or chilled items. As a so-called LTL (less than truckload) carrier, Respondent services more than one consignee for each trailer load.

From its ''central dispatch'' headquarters in Opa Locka, Florida, Respondent superintends a nationwide network of about 18 terminals through which consignments are processed by long distance over-the-road drivers or ''peddle'' drivers, who are generally paid by a mileage and weight calculation, and local hourly paid drivers, who rarely remain en route overnight and who generally service the geographic area around the terminal of their domicile. A third category of driver utilized is the owner-operator who owns his own equipment and who leases it to the Respondent as an independent contractor. Respondent also employs dockworkers and loaders at each terminal. It is undisputed that Respondent's past practice has been to primarily utilize local drivers to make pickups and deliveries within the geographical area of their terminal of domicile and also to utilize over-the-road drivers who come into that area from other terminals for the same purpose when business conditions warrant it. According to Respondent, a practical judgment is made by the local terminal dispatcher as to which driver he should use based on the economics, method of pay, availability of local driver, and what over-the-road drivers are known to be coming into his area and his jurisdiction as revealed by computerized information issuing from central dispatch. It is the economic objective of the local dispatcher to send out the fullest possible loads with the fewest drivers.

Only the drivers at the Hackensack, New Jersey, and Chicago, Illinois terminals are represented by a labor organization under collective-bargaining agreements.

Of the 18 terminals, as of late 1990, Respondent maintained four ''break bulk'' terminals at Atlanta, Georgia; Charlotte, North Carolina; Dallas, Texas; and Winter Haven, Florida. A break bulk terminal serves as distribution center whose consignments coming from a variety of terminals converge and are unloaded and reassembled for ultimate delivery to a local terminal or to another break bulk terminal.

Although Respondent had done business for some years out of the Hackensack terminal, about 4 years ago it decided to locate a second terminal in New Jersey. An opportunity arose in early 1989, when the C.R. England Company decided to abandon LTL operations out of its warehouse in Burlington. Respondent was aware of the Burlington market growth potential because it had serviced the areas from the Hackensack terminal about 80 miles away. Commencing about April 1989, Respondent assumed England's LTL business and rented space in England's warehouse from which England also continued its refrigerated full truckload operations.

The break bulk terminal from which Respondent serviced the Burlington terminal was, of course, Charlotte where less than truckload goods over the entire northeast would be shipped for reassembly and, to some extent, sent backup again to Burlington. Respondent discovered the adverse time factor involved was greater than anticipated. Respondent's president, Sidney Alterman, testified that because of that factor, some clients who demanded shorter, quicker delivery ceased doing business with Respondent. In the fall of 1990, Respondent became the owner at a facility in Bridgeport, New Jersey, where, after a remodeling of the existing building, it planned to establish a break bulk terminal. All Burlington operations were to be transferred to the longer expanded operation at Bridgeport, where tonnage was to be diverted away from the Charlotte terminal. On March 4, 1991, Respondent commenced its vastly expanded operations as a break bulk terminal at Bridgeport, 40 miles away from its former Burlington operations where, from late 1990, it had rented terminal dock and refrigerator space from England at sufferance, without a fixed-term lease, until such time as the unanticipated much delayed renovation had been completed. Respondent utilized some of England's dockworkers to augment its own dock loaders at the Burlington facility.

In the fall of 1990, Respondent had expectations of establishing Burlington as a major break bulk terminal. Such a facility by its nature maintains a greater flow of consignments and thus a higher number of over-the-road drivers domiciled there. A question to be resolved in this case is whether an

[1] Counsel for General Counsel's unopposed motion to correct transcript is granted.

increase in hourly drivers would also have been a consequence, and conversely whether a reduction in the use of local hourly drivers would have occurred by means of an unplanned, discriminatory intervention such as the transfer of work local drivers would have otherwise done to over-the-road drivers because of the local drivers' union activities. Alterman testified that he expected Burlington to equal the size of the Charlotte terminal. The workload of the established Charlotte break bulk terminal warrants a complement of 40 to 50 dockworkers, 30 to 40 long-distance drivers, 15 ''intermediate'' distance drivers, and, according to Sidney Alterman's somewhat evasive response, ''six or seven'' or, as he testified after quick reflection, ''five or six local drivers.'' However, according to undisputed testimony, although it carries 100 percent more tonnage than Bridgeport, the union-represented Hackensack's terminal has only three local drivers.

At the representation petition hearing on November 15 and 16, 1990, Respondent took a position that the unit at the Burlington terminal was to expand so much as to preclude a question concerning representation. At that hearing, Sidney Alterman testified that the expectation was for such an expansion of tonnage that 30-drivers and 20 dockworkers would be required. Of those 30 new drivers, he at first specified that 15 would be mileage and weight drivers and that 15 would be ''regular hour drivers'' (Tr. 138). He testified, ''[W]e already have the weight . . . and present tonnage . . . the work will continue on. I will just transfer from Burlington to Bridgeport . . . with a number of people I am presently using.'' (Tr. 143.) He testified that as of November 1990, Respondent had utilized a large number of non-Burlington domiciled drivers for the Burlington area pickups because Respondent had experienced a ''shortage of drivers or [because they] are hard to get.'' In that case, Sidney Alterman conceded that qualified drivers are not readily available and training requires time. He testified when asked what he intended to do if he could not hire a sufficient number of drivers at Bridgeport to satisfy the 30 driver objective:

> We have various systems of how to move the freight.
>
> We have been doing it for a number of years and we will continue to do at in some fashion. [Tr. 159.]

It is Sidney Alterman's testimony in both the representation hearing and at this trial that Respondent intended to increase the tonnage at Bridgeport not only by diverting over-the-road break bulk terminal destined tonnage from Charlotte and tonnage previously sent to the Pittsburgh, Pennsylvania terminal, but that also he expected a growth in the local market. The local growth was not only to be gained from the abandonment of the local LTL market by England but also by the solicitation of new local customers. Thus the only inference to be raised from that testimony is that Respondent expected an expansion in the need for local drivers. Therefore, when Respondent's counsel was asked in the representation case hearing for a statement of position, he responded:

> Five local drivers [now employed at the Burlington terminal] do not constitute an appropriate unit—reason number one, it's an expanding unit. [Tr. 183.]

Despite the foregoing testimony, Sidney Alterman altered the expectation of an increase in the hourly driver complement in subsequent testimony at the same representation case hearing when he later testified that he expected to employ only ''two or three'' hourly drivers and 20 to 30 mileage and weight drivers at Burlington. Thus, within a short span of less than 100 pages of testimony, economic expectations changed the predicted ratio of hourly to other drivers that would be required by the then state of local business. When cross-examined by the union counsel, he testified that with respect to the then complement of five Burlington drivers that ''possibly they will be 'cut back.''' When asked how he could so testify in the fact of an expected expansion of tonnage, he answered: ''By using the system that the other break bulk terminals use.''

After a series of questions and answers which constituted a dialogue of whether or not it was more economical to use hourly drivers in certain circumstances, Alterman testified:

> A. That is an operational decision to be made by the Company and we do that.
>
> Q. Is it foolhardy?
>
> A. We own the Company, and we have a right to make those decisions to maintain an orderly type of system and that is what we do. [Tr. 279–280.]

At that representation case hearing, Alterman went on to testify that the work of hourly drivers had decreased since the beginning of November, ''because business fell off.'' (R. Exh. 283.) He testified that his greater problem in staffing was the more severe shortage of dockworkers. Thus, in the representation hearing, Alterman rendered three different versions of the expected local driver complement at Bridgeport. First, it would expand to 15 drivers from a point when 5 local drivers already constituted a shortage of drivers needed for local service. Second, it would reduce to three drivers despite an expected tonnage increase because a different system of driver utilization would be employed as had existed at other break bulk terminals. Third, the local driver complement would be reduced because of a loss of business.

At the instant trial, Sidney Alterman testified that at Burlington, Respondent attempted to pay drivers more rigidly according to their classification because an initial attempt to pay local drivers on a mileage basis proved unsuccessful. He did not explain.

Louis Fischer testified that he was hired as a mileage and weight driver but, because of the low net earning under this formula, Respondent agreed to reclassify him as an hourly paid driver with a resulting higher earnings. Alterman testified that at Bridgeport, he has followed Respondent's nationwide policy of paying terminal drivers at both methods when the advantage to Respondent arises. Thus, the somewhat more rigid practice of compensation by classification at Burlington came to an end at Bridgeport, according to Sidney Alterman's own testimony.

The issue before us is whether an admitted reduction in use of local drivers on the heels of union organizing efforts was the consequence of their protected activity or whether it was a necessary consequence of economic conditions.

B. *Union Activity at Burlington*

The Burlington terminal was the site of attempted union organizing activities and Respondent's alleged discriminatory reaction to it. As of October 1, 1990, Respondent maintained a staff of three lead loaders. Of these, Gordon Bennett was employed on a full-time basis whereas Mark Daugherty and Andrew Celmer worked only part-time. Five hourly local drivers employed were Louis Fischer, Richard Tablas, Perry Rease, Timothy Craven, and Miguel Ojeda. Their hiring dates are as follows:

Tablas—11–17–89
Rease—12–4–89
Ojeda—3–5–90
Fischer—3–31–90
Craven—8–24–90

Tablas had resigned on May 17, 1990, and was rehired on September 5, 1990. Thus only 1–1/2 months prior to Sidney Alterman's representation case testimony of ''possible'' plans to reduce the number of hourly drivers at an expanded Bridgeport operation, Respondent had sufficient local service potential to rehire Tablas and to hire a fifth new driver. The weekly hours worked by each of these drivers for October 1990 and up to November 5, 1990, averaged from 46.5 to a high of 59 hours. Respondent's Burlington managerial staff consisted of Terminal Manager Frank Van Horn; Office Manager Bill Flyer; Dock Supervisor James Narine; and Chief Dispatcher Wendell Lee, all undisputed supervisors within the meaning of the Act.

The prime union activist appears to be Louis Fischer. According to his own undisputed testimony, in mid-September 1990, he had confronted Lee, Narine, and Van Horn with the local drivers' complaints as to their fringe benefits status and a variety of working conditions. Somehow, thereafter, a meeting was arranged between the five local drivers, Bennett, and two other employees, apparently nondrivers, with two union representatives at a local restaurant where they all executed union representation authorization cards. Other employee union meetings were thereafter held at Bennett's home, including one on October 10. However, on October 29, 1990, the Union filed a petition for representation for Respondent's Burlington drivers and dockworkers in Case 4–RC–1794. At the November 15 and 16, 1990 hearings, the Union stated its position in favor of a unit inclusive of hourly paid local drivers, and also an unspecified number of over-the-road drivers domiciled in the Burlington area.

C. *November 5—Van Horn Interrogation*

Van Horn testified that he had become aware of ''scuttlebutt'' to the effect of union organizing efforts even prior to telephone notification from a Board agent on or about November 5. The office manager had reported to him such talk overheard on the loading dock. Furthermore, Respondent's labor counsel, specifically engaged to advise Respondent, had, according to Van Horn, visited the terminal and instructed him even prior to that telephone notification. Van Horn admitted that counsel had instructed him on how to noncoercively retrieve information from employees regarding their union activities without asking ''direct'' questions. He admitted that his supervisor in Opa Locka had ordered him to find out ''what was going on.'' Van Horn testified that he had maintained a 15-year acquaintanceship with Fischer and, because of that and because Fisher had appeared to be a spokesperson for employee grievances, Respondent's counsel instructed him to summon Fischer to his office to engage in a supposedly noncoercive investigation, where hopefully Fischer would spontaneously volunteer information as to the extent of employee support and activity for the Union and Van Horn would merely be a ''listener.'' Van Horn admittedly then summoned Fischer to his office where he immediately demanded of Fischer, ''what the hell is going on.'' Van Horn claimed that he made no specific reference to the ''union'' nor identity of union sympathizers but that Fischer just garrulously launched into an explanation of those activities which Van Horn dutifully recorded in a notebook. Van Horn was at trial led by Respondent's counsel into a series of categorical denials as to what Fisher had testified. Van Horn gave no full contextual narration of what transpired. Even if he were to be believed, according to his own testimony, a highly coercive context resulted. Clearly it was understood by virtue of known and suspected union activities of Fischer that Fischer was being interrogated as to union activities. In any event, I credit the more certain, spontaneous, fluent, responsive, detailed, and contextually framed testimony of Fischer rather than Van Horn's cryptic, hesitant, unconvincing denials.

In the office interrogation by Van Horn on November 5, it is Fischer's credible testimony that Van Horn immediately demanded that he reveal ''what the hell is going on,'' referred to the Board agent's telephone call and expressed chagrin of not being informed of union activity in the terminal. At that point, Fischer told him at least one-third of the employees had decided upon union representation. Van Horn retorted, ''My God, there are only five of you; what do you expect to gain?'' Fischer reiterated the complaints he had earlier conveyed to Van Horn but Van Horn pretended unawareness of them and without success asked Fischer to identify those employees who had supported the petition, where they had met and when they had met. Van Horn then told Fischer that he knows ''for a fact'' that Sidney Alterman ''will fight you . . . to the end'' and that Alterman was ''dead set'' against union representation.

Van Horn's emotional, high strung reaction to and interrogation of union activity is not exculpated by the so-called past ''friendship'' between himself and Fischer. That relationship was clearly presumed upon in a setting of and display of managerial authority. The recitation by Van Horn of high level animosity to the Union and the implication that resort to union organizing was futile, objectively tended to constitute the interview as that of an ominous implied warning, not a mere casual interchange between friends over dinner in a public place. The interrogation of who, when, and where the employees engaged in union activities served no legitimate interest, transpired in a coercive atmosphere and, therefore, I find, constituted unlawful coercive interrogation in violation of Section 8(a)(1) of the Act.

D. *November 5—Sidney Alterman Threats and Promises*

At 1:30 p.m. on November 5, Fischer was introduced to Sidney Alterman at the Burlington terminal driver's dispatch window and a conversation ensued between them. According to Fischer's uncontradicted testimony, the conversation took place in the presence of Van Horn, Wendell Lee, and two

Florida based over-the-road drivers, Williams and Allen. Alterman essentially responded to Respondent's counsel's elicitation of categorical denials to certain parts of Fischer's account of the information. He admitted that he told Fischer that he would take ''every legal means'' to remain nonunion and ''may have'' referred to a virtually nonunion national operation for 40 or 50 years. Lee and Van Horn did not give their account of the conversation nor did they deny their presence.

Fischer testified that in the foregoing afternoon confrontation, Sidney Alterman introduced himself to Fischer, told him he was there because of union organizing problems, that he had been in nonunionized business for 50 years, and ''more or less'' that there would not be a union at Burlington inasmuch as ''oil and water don't mix.'' Further, Alterman expressed unawareness of employee work problems but that he would send a group of people up to the terminal to solve them. At that point, Fischer reminded him that he had been previously promised a jacket but had never received one. It is undisputed that in the past Alterman had maintained a practice of distributing such items as jackets and writing pens to the terminal drivers. Alterman thereupon asked Fischer's jacket size and promised to get him a jacket.

Fischer placed neither Tablas nor Craven at the scene of this conversation. However, both testified as to having witnessed such a conversation particularly with references to the ''oil and water'' and 50 years of nonunion operation. The General Counsel argues that Tablas and Craven are referring to a subsequent confrontation between Fischer and Sidney Alterman on November 14. If so, they are inconsistent with Fischer's November 14 account of an extremely succinct statement of opposition to the Union by Alterman. As Alterman himself conceded making remarks about his nonunion history on November 5, and intent to use every legal means of opposition, I conclude that Craven's and Tablas' testimony corroborates the November 5 confrontation and not November 14. Tablas himself places it on November 5.

With respect to the promise to remedy drivers' work complaints, they do not corroborate Fischer. According to Tablas, Alterman said he was unaware of the drivers' problems but ''we can get together and work them out.'' Even if credited, this is nothing more than an employer's statement that collective bargaining is not necessary because any problems can be resolved without intervention of a bargaining agent. It does not constitute a clear promise to remedy specific complaints in the manner requested by employees. Craven, whom Tablas testified was merely filling out forms, recalled no promises but instead recalled Alterman as opposing the Union ''because everybody would want a piece of the pie.''

Fischer's own testimony as to the alleged promise was first prefaced with: ''he more or less said.'' Upon pointed repetition by counsel for General Counsel, the response became: ''he said.'' Fischer was far from certain and forceful on this point as compared to his other testimony. Because of the inconsistencies of General Counsel witnesses' testimony and uncertainty, I credit Sidney Alterman's categorical denial that on November 5, he promised to remedy employee grievances. In view of the uncontradicted testimony of Sidney Alterman as to Respondent's past and ongoing practice to distribute work jackets and other gifts to all employees, I cannot find that his promise to give Fischer a jacket previously promised to him constituted an unlawful promise of a gift. Had Alterman ceased such practice during ongoing union activity, he would have been in jeopardy of committing another unfair labor practice. Cf. *Grupta Permold Corp.*, 289 NLRB 1234 (1988).

Fischer's, Craven's, and Tablas' account of Alterman's self-characterization of antiunion animus is not certain and clear enough for me to find Alterman coerced employees by telling them implicitly that he would retaliate against their activities on behalf of union representation or that he would frustrate the processes to obtain collective bargaining by unlawful means. Neither Fischer nor any of the drivers who testified appeared so naive as not to realize that the mere resort to lawful procedural resistance generates such a delay as to frequently induce impatience and abandonment of union representation by employees likely to become impatient or who have gone on to other employment or who have simply changed their minds. Suggesting to employees the brutal facts of life with respect to inherent procedural delays does not amount to such an abuse of the right of free speech as to constitute unlawful coercion. Nor do Alterman's comments suggest that his resort to a lawful resistance and counter-campaign necessarily precludes their voluntary abandonment of union representation as a result of a lawful, noncoercive election campaign. A statement of certitude in the success of this lawful resistance can hardly constitute an unlawful threat. Election campaigns are not lost by unions solely because of unlawful conduct by the employers. Respondent has successfully avoided union organizing efforts for the vast preponderance of its terminals, and it has not been demonstrated that it has done so through unlawful means. Thus, Alterman's assertion of certitude, premised on 50 years' experience that there will be no union because he will resort to all legal means to frustrate it, does not constitute an unlawful threat. It is, however, revelatory of Respondent's' attitude.

E. *November 7, 1990—Van Horn Telephone Call*

Fischer testified that at 2:30 p.m. on November 7, 1990, from his home he telephoned Van Horn to discuss certain personal business matters he had with a prior employer where Van Horn had been employed in a managerial position. In that conversation, Fischer claims that he raised the subject of the sudden loss of work for hourly drivers. Van Horn denied that he had any such conversation and categorically denied the essential elements of Fischer's account. I credit the more convincing, vivid testimony of Fischer. His certitude outweighed the weak, hesitant denials of Van Horn.

In that November 7 telephone call, Fischer demanded to know why the work for local drivers had suddenly and drastically been reduced. To that question, Van Horn answered with the statement: ''No more Mr. Nice Guy.''

Fischer expostulated his bewildered disbelief, but Van Horn pressed on with the statement that as the representation case proceeds to a hearing, Respondent will ascertain the identity of prounion employees and ''get to the bottom of it.'' Fischer responded that it did not matter who was behind the Union nor why, and that Van Horn had already known why they wanted representation. Van Horn retorted: ''Sidney Alterman is going to fight you . . . drag this out . . . spend $50,000, $100,000 to fight you people.''

Van Horn's answer to an explanation of why there was a reduction in local driver work assignments, in the full con-

text of that conversation and his preceding remarks to Fischer, clearly constitute an implicit admission that work was being denied local drivers because of their union activity and a threat that any further union representation efforts would be futile because of that loss of work and other unspecified, but implied retaliation. I find that Van Horn's statements violated Section 8(a)(1) of the Act.

F. *Early November—Lee Conversations About Lack of Work*

Local driver Perry Rease testified, without explicit contradiction, that in the early afternoon of November 9, 1990, he engaged in a conversation with dispatch supervisor Lee in the terminal driver's room. In a very fluent and precise testimony accompanied by a demeanor of assuredness, Rease testified that he inquired of Lee whether his reduction of 2 weekday workdays was permanent and, if so, whether he could substitute another workday. He also asked Lee why there had been such a sudden drop of work assigned to local drivers. Lee responded: ''I want you drivers to know it is not my doing. It is out of my hands.'' In and of itself, such a statement is arguably ambiguous and not clear enough to constitute a threat. Lee may have been referring to a business downturn. However, if he had that in mind, a question arises as to why he was so defensive about this personal responsibility and why he did not come right out with an explicit economic exculpation.

Bennett testified that at the beginning of November, he spoke to Lee about the reduction in work. The full context of the conversation was not given. According to Bennett's uncontradicted testimony, he asked Lee why the work hours were so ''crazy,'' and Lee stated that he ''didn't know what Sidney Alterman was going to do about the union problems.'' The ambiguous answer was unresponsive to the question unless it is interpreted, as it can only reasonably be interpreted, that work was purposely depressed because of Sidney Alterman's reaction to the union organizing effort.

On November 7 at 4:30 p.m. in the dispatch area of the Burlington terminal, Fischer engaged Van Horn in a conversation abut the sudden reduction of his hours because of a purported lack of work. Fischer suggested by implication that there was a retaliatory purpose to the drop in his work assignments. Fischer testified that Van Horn answered: ''Oh, no, things are slow . . . . We're not doing that. It is just slow.''

Fischer also testified, without explicit contradiction, that he had several conversations with Lee about the reduction in his driving assignments wherein Lee answered that he was ''not doing this'' but was rather ''just following orders.'' Fischer testified that on Monday, November 19, at 11:30 a.m., he commented to Lee that he looked ill and asked what was wrong. Lee answered: ''I have been sick all weekend. . . . I don't like what I am doing here . . . what they are asking me to do.'' Fischer asked how long the depressed work schedule would persist. Lee answered that he did not know but that ''things have to pop the next 2 to 3 weeks because we are in the busy season.''

Lee only testified to generalized denials. Thus, he testified that there had been no change to the method of his assignments, that there had been a ''big reduction'' in pickups and deliveries in the fall of 1990, that there had been no other reason for the reduction in driving assignments, and that he never told the drivers that there had been any other reason.

Lee testified that he was told by Tablas of his intended resignation because of lack of work about 1 week before that termination. Tablas resigned on February 8, 1991. Lee denied having told Tablas that it was not his fault. He did not deny telling others that the reduction in hours was ''not my fault.'' Rease, not Tablas, testified to a preresignation conversation with Lee. Rease resigned on March 15, 1991, because of a reduction in his work assignments and concomitant lower pay. He testified to a conversation about that decision about 1 month before he quit.

Wherever there is a direct conflict in testimony between any other witness and Lee, I discredit Lee. His demeanor, even in direct examination, revealed a hesitancy, uncertainty, and guardedness that precluded any sense of candid spontaneity. His testimony consisted in large part of categorical denials and answers to leading questions. He gave every appearance of being the haunted, guilt-ridden person depicted by the General Counsel's witnesses' testimony. Standing alone, his remarks and denials of personal responsibility are arguably ambiguous. Their cumulative effect as to this evidence of unlawful motivation must be evaluated on the totality of the record.

I find that in the context of other union animus and unlawful coercion by Respondent, Lee's repeated self-exculpations of personal responsibility were calculated to imply that a depression in work assignments were retaliation for union activities, and thus violations of Section 8(a)(1) of the Act.

G. *November 14—Fischer/Sidney Alterman Conversations*

Fischer testified that the day before the representation hearing on November 14, 1990, at 4:30 p.m. at the Burlington terminal dispatch window, in the presence of drivers Craven and Tablas, he engaged in a conversation with Sidney Alterman initiated over the subject of which of the Burlington drivers will move to the Bridgeport terminal. For the reasons noted above, I conclude that Craven and Tablas either did not witness this confrontation or had confused it with the November 5 encounter. Again, Sidney Alterman failed to give a narrative account of that conversation. He merely responded with categorical denials elicited by counsel. He testified that he would not have made certain statements regarding the Union because his counsel advised him and was present in the terminal on that date. I will take notice that clients do not universally follow the advice of counsel. In any event, I credit the detailed, narrative of the more convincing Fischer concerning the reference to the Burlington terminal, which Alterman did not adequately contradict.

As Fischer approached the dispatch window at the Burlington terminal at 4:30 p.m., he encountered Sidney Alterman who reminded him of the promised jacket and tendered one to him which it turned out did not fit. Alterman raised the subject of the Bridgeport terminal by saying: ''I understand that four of you are moving [to Bridgeport]?'' Fischer answered that he understood that all five local drivers desired to accept a transfer and that Fischer himself will then be located only 12 miles from his residence. Alterman said ''good,'' and then promised to supply them with hats and coats imported from China and to ''dress us good.'' Almost

as an afterthought, Fischer added to his narrative that Alterman said that he ''will not have any union.''

In view of Alterman's stated premise of the resort to ''legal means'' to frustrate union organizing activity, I do not find this cryptic remark to constitute a threat of unlawful retaliation or threat of unlawful resistance to collective bargaining. In view of the ongoing policy and practice of providing drivers with articles of clothing at Bridgeport, I again cannot find the promise of maintaining such a policy at Burlington to constitute an unlawful promise of a benefit.

Thus, as of November 14, Sidney Alterman evidenced a strong aversion to union representation of the Burlington drivers but had not yet given any indication that any of them might be terminated on the transfer to Bridgeport. On the contrary, he suggested that all five local drivers would be welcome there, and thus he implied that sufficient work for them would, or could, continue.

H. *November 14—Confrontation with John Alterman*

At 5 p.m. on November 14 at the Burlington terminal, Fischer and John Alterman encountered each other and engaged in a conversation in which the General Counsel alleges the latter solicited employee grievances and made certain unlawful promises. John Alterman is the financial vice president and general counsel of Respondent. He has also practiced real estate, corporate business, and some labor law as an attorney for 17 years. Although in the terminal earlier, he was not in the immediate presence of the above-described conversation between his father Sidney and Fischer. John Alterman testified that Van Horn had reported to him his earlier conversation with Fischer, including Fischer's repetitions of employee complaints and also including the November 5 conversation.

Both Fischer and John Alterman each claim that the other of them actually initiated the conversation and its location in a private area. Fischer claims it occurred in a small kitchen. Alterman says it was in a private office. Alterman testified that Fischer started to recite the same complaints as reported by Van Horn. Fischer testified that John Alterman started the conversation by saying that he had been unaware of the existence of problems amongst the employees and was at a loss to understand why but Alterman also stated that he could not make any promises. Without explicitly being asked to relate those problems, according to Fischer's own testimony, he freely repeated all the complaints he had raised to Van Horn. Respondent's assessment of Fischer's volubility as manifested in the instructions to Van Horn proved to be accurate. His assertive nature and lack of inhibition led him to fully detail to Alterman the nature of those complaints. John Alterman became the listening post that Van Horn was supposed to have been. John Alterman, however, made no threats. He is alleged to have made promises.

Fischer testified that he told Alterman that though he was supposed to have been provided health insurance coverage after his hire, he still had not yet received it. According to Fischer, Alterman said that he would ''look into it.'' Fischer testified that he reminded Alterman that employees are not paid overtime for certain hours worked over 40 weekly hours. Alterman testified that Fischer accused Respondent of violating the law with respect to overtime. Although it is disputed how he phrased it, clearly Alterman responded that he understood that a privilege existed that exempted perishable food carriers such as Respondent from certain overtime obligations and that Alterman would review the law to be sure he was not in violation.

Fischer testified, without contradiction, that he then told Alterman that he had made his complaints to Van Horn to no avail and that he did ''not know where else to go.'' Fischer testified, without contradiction, to the following discourse:

> John Alterman: You could have come to management. You could have picked up the telephone. We have an open door policy.
>
> Fischer: I am unaware of it.
>
> John Alterman: If anyone stops you let me know.

Aside from Fischer's cryptic comments to Alterman, there is no other evidence of the existence or lack of existence of an ''open door policy.'' The General Counsel alleges that Respondent unlawfully promulgated a new policy by John Alterman. However, Fischer's ''unawareness'' is not sufficiently probative of whether anything new was promulgated.

Fischer's testimony did not detail any further reference to specific complaints he raised to John Alterman. According to Fischer, he raised the subject of Gordon Bennett by stating that there had been a vast improvement in dock problems on Bennett's hiring, to which Alterman informed him that Bennett had been discharged because of a conflict with a customer.

It is John Alterman's uncontradicted and thus credible testimony that he not merely said that he could make no promises but that he also said that he could ''only listen.'' Alterman testified, without contradiction, that with respect to Fischer's complaint that employees were deprived of an adequate lunch period, he interrupted Fischer by telling him of the existence of a universal companywide policy on a mandatory lunch period and if he was forced to work through lunch it would be looked into. The existence or nonexistence of a lunch policy, like that of the open-door policy, was not litigated at this trial, and no finding can be made that one did or did not exist. In any event, Fischer responded to the proffer ''to look into it'' that he had already made a specific complaint to Van Horn prior to known union activities.

With respect to Fischer's complaint regarding hospitalization coverage, John Alterman testified that he only commented that medical costs were rising and made no promise of any kind. Similarly, with respect to a complaint of low pay, as with other complaints, he made no promise to take any specific action except, as noted above, to verify his understanding of the pertinent wage and hour laws.

I find that the evidence fails to establish that in that conversation Respondent deviated from any proven prior policy nor that it instituted any new policies or practices, including that of listening to employee complaints. Fischer had aggressively and openly acted as a spokesperson for employee complaints. He had early confronted Van Horn in this capacity. It is irrelevant whether John Alterman or Fischer raised the subject of ''problems.'' Clearly, Fischer was not coerced nor even explicitly invited to recite again to John Alterman the very same complaints that he had already conveyed to Van Horn prior to known union activities. I am unable to find that John Alderman solicited employee grievances. Both witnesses gave different accounts of just what area John

Alterman intended to ''look into.'' On this point, I credit Alterman who was more certain and cohesive in his narration. Fischer, a forceful and assertive witness, tended to become heated, rushed, and emotional during parts of his testimony and did not convey certitude as to Alterman's specific replies to specific complaints. But even under Fischer's account, I cannot find that within the context of this conversation, ''look into'' a complaint constitutes a promise to effectuate a remedy. ''Look into'' can also mean a review of past personnel action which results in a detailed explanation to the employee as to why that action transpired and not necessarily a change of that action.

I. *Dock Supervisor Threats and Interrogation*

James Narine, the dock supervisor and admitted agent of Respondent, did not testify, and I accordingly credit the testimony of the General Counsel's witnesses as to his conduct except as noted. Dennis Cryan was employed by C. R. England on the dock of the Burlington terminal and worked along with Respondent's employees. He testified that in early November, probably on or about November 5, he had engaged in conversations with Bennett in which Bennett solicited his support for the Union and promised him employment by the Respondent at the Bridgeport terminal if the Union were to represent employees there. Several days later, Narine told Cryan to stay away form union activities or he would be discharged and repeated that warning several times before Cryan's termination by England on November 12. Cryan testified that Narine did not supervise his activities and was his personal friend and, moreover, the conversations themselves were friendly. No context was given for any of these conversations. Cryan could not recall who or how the subject of the Union was raised. Given the uncertainty of Cryan and the lack of any context for the alleged threat, I cannot premise a finding of coercive interrogation in what Cryan characterized as a friendly conversation of his nonsupervisory friend. The issue of Respondent's responsibility for Narine's statements to Cryan, an employee of England, becomes moot. Moreover, the threat of employee termination is inconsistent with subsequent conduct attributed to Narine and therefore improbable.

Fischer testified that on November 30, while he was walking toward his vehicle in the Burlington terminal yard, Narine approached him and complained that the other employees had ceased talking to him. Fischer responded that it was ''because of the events with the Union going on that no one talked to each other anymore.'' Narine then allegedly interrogated Fischer as to the identity of persons who had attended the union meetings and the reasons for their union activity. Fischer testified that he then promptly disclosed to Narine that all five local drivers and dockworkers had signed union cars at a meeting on October 28. Narine responded that although Sidney Alterman opposed union representation, he would not retaliate against employees by discharging them because of union activities.

I am unable to credit Fischer's account of this conversation. I find it highly improbably that Respondent had not already ascertained from Fischer the full explanation for the prounion motivation. It is also most likely that Respondent already was aware of who supported the Union. Fischer testified that as early as November 5, Van Horn told him that there were only ''5 of you,'' i.e., five local drivers. Furthermore, even if the identity of union supporters was unknown to Respondent as late as November 30, it is unlikely that Fischer would have freely disclosed it to the dock supervisor when he had already refused to make an earlier disclosure to Terminal Manager Van Horn. Given Fischer's ''street wise'' sophistication, he would only have made such a disclosure if it had become common knowledge. By November 14, Bennett had already been discharged as an alleged known union activist.

In view of my problems with Fischer's credibility as to his conversation with Narine, I find it unnecessary to determine whether if he had been questioned, it would have been done in a coercive manner, given Narine's insistence that Alterman would not discharge any employee because of union activity. Finally, if the General Counsel is correct as to allegations of dock loader Bennett's November 14 discharge, it seems unlikely that Narine would have made a disclaimer which would neutralize the coercive impact on other employees of such a discharge.

J. *Bennett's Discharge*

Gordon Bennett was employed as the lead loader at the Burlington terminal. Respondent, as part of an affirmative defense, alleged that Bennett was a supervisor and thus not protected by the Act. In cross-examination, Bennett grudgingly admitted that his position was being cultivated for ultimate supervisory status at the Bridgeport terminal. At most, the Respondent established that Bennett possessed some degree of responsibility for the loading and unloading of Respondent's vehicles in which Bennett engaged in the same physical tasks as those England employees whom he directed in those functions at the Burlington terminal. Bennett's responsibility appears to be in the conveying of instructions to those loaders as to what item is to be placed on or retrieved from which vehicle and/or where it is to be placed in the Burlington terminal. There is no evidence as to whether these directions involve the slightest application of discretion or independent judgment. From the record, it cannot be demonstrated that Bennett's responsibility rises above that of a routine reading of shipping records and conveying of instructions based on a predetermined flow of the load consignment. Bennett has not been shown to have responsibility for or the exercise of matters concerning employee status, compensation, hours of work, or discipline. It is uncontradicted that Narine possessed those responsibilities. The most that Respondent has achieved has been to establish that Bennett was a highly valued employee of enhanced status and supervisory potential, i.e., not a casual dock worker whose services an employer would readily abandon.

Bennett's solicitation of support for the Union among the dockworkers was disclosed to Respondent by the happenstance of the discharge by England of its dock worker Dennis Cryan on November 12, shortly after a November 10 union meeting at Bennett's home. William McNally is the east coast manager for C. R. England and is responsible for the management of its operations at the Burlington terminal. He discharged Cryan, an employee he described as having the worse disciplinary record of any of his employees. As a Respondent witness, McNally testified that he discharged Cryan by telephone notification on Monday, November 12, based on a complaint made to him on Thursday, November 8, by Bennett that Cryan had been pilfering goods at the ter-

minal. Bennett denied having accused Cryan of stealing. With respect to the episode of Cryan's discharge, the testimony of Cryan, a General Counsel witness, conforms more with the testimony of McNally than it does with Bennett. In fact, Cryan sharply contradicts Bennett on several crucial points. I credit Cryan as having the least interested, most detached and more convincing demeanor.

McNally discharged Cryan on Bennett's accusation of misconduct without independently investigating, not because he relied on Bennett's recommendation as a supervisor. McNally readily believed the accusation because of Cryan's alleged past misconduct. Thus, Bennett acted in a supervisory capacity no more than any other employee who might have reported the alleged thievery. England's dock supervisor, in fact, was Al Zigler with whom Bennett had a recent work dispute irrelevant to this case.

On Cryan's discharge on November 12, he testified that he requested a person-to-person confrontation with McNally, whom he testified had not proffered a reason for his discharge of which he was notified by telephone. On Tuesday, November 13, Cryan confronted McNally in person with Van Horn present. There is some divergence between Cryan and McNally as to what was said. They are not far apart in significant substance. According to McNally, when first notified of discharge, Cryan urged McNally to investigate by talking to Van Horn. He explained that Bennett attempted to recruit Cryan as a prospective Respondent employee at Bridgeport. Cryan does not contradict this testimony.

At the Tuesday, November 13 confrontation, Cryan admitted that he raised the subject of the Union by asking McNally whether it was union activity or suspected thievery that prompted his discharge. He testified that he told McNally that the union-Bridgeport employment solicitation with himself and other employees occurred in a ''couple of conversations'' during work hours when McNally asked him when they did. He admitted that he, not McNally, had raised the subject of proffered employment at Bridgeport and that he told McNally that 10 minutes of time were involved while they were idle, awaiting freight. He admitted that he told McNally the recruitment for Bridgeport employment was made contingent by Bennett on Cryan's support for an ongoing union organizing effort for Respondent's employees.

McNally had summoned Van Horn to the November 13 confrontation. Van Horn's participation was essentially passive. According to McNally, Cryan had accused Bennett of trying to get him fired so he would then have to accept the Bridgeport solicitation.

McNally testified that after the November 12 telephone call, he summoned Van Horn to the meeting because he felt that he might have discharged the wrong person. He testified that Van Horn asked some followup questions of Cryan in clarification of the recruitment solicitation. McNally also confronted Bennett but who, in turn, complained that Van Horn had ''trumped'' up the whole incident in order to get Bennett discharged. McNally testified credibly that the involvement of recruitment of his employees breached a standing agreement between England and Respondent arising from prior incidents of attempted recruitment in the summer of 1989 and 1990 by Narine. Respondent had reacted to McNally's vehement protests by agreeing to cease such activity. Although Narine had not been reprimanded, Respondent agreed in the summer of 1990 that any future breach of the agreement would result in the discharge of the culpable Respondent agent.

McNally testified that he interviewed Pittman in Van Horn's presence to confirm Cryan's assertions with respect to the recruitment effort. He admitted that in the process he interrogated Pittman as to whether there were and of what duration were discussions on worktime among the England dockworkers with Bennett regarding the Union in the context of future recruitment by Respondent at Bridgeport. McNally testified that Pittman corroborated Cryan but told McNally that he ''walked away'' when Bennett started to discuss the Union. The General Counsel's witness, Mark Pittman, an England dock worker, testified that he was summoned to Van Horn's office by McNally and Van Horn. He testified that McNally explained that he had just discharged Cryan, but was unsure if he did the ''right thing'' and wanted to get to the ''bottom of what was going on.'' According to Pittman's initial testimony, ''they,'' i.e., ''both between'' McNally and Van Horn, asked him whether Bennett or Cryan had approached him on the dock during working hours and asked him to join a union. But on further examination, he thought it was McNally who raised Bennett's name. He was uncertain and he admitted it. He testified that neither manager asked about recruitment at Bridgeport. McNally did not ask whether they were actively working at that moment, which they were not. He responded that Bennett engaged him in a 30-second conversation one time during work hours and told him that Bennett had some union informational materials in his vehicle for Pittman, if he was interested, after work.

Pittman and McNally conflict as to what extent Pittman corroborated Cryan. Pittman testified that he was not asked by McNally about recruitment for employment at Bridgeport. Van Horn was not examined by counsel for Respondent as to the Pittman and Cryan interviews.

The General Counsel alleges that Van Horn's participation constitutes unlawful coercive interrogation in violation of the Act. I do not agree. With respect to Cryan, he was a nonemployee of either Respondent or England at the time and it was he who instigated the confrontation and it was he who raised the subject of the Union's solicitation. With respect to both interrogations, there was no suggestion that the rehiring or employment or either employee by England at that terminal was dependent on Respondent's pleasure. Respondent's agent played relatively a passive role. It was McNally who was the questioning agent exclusively of Cryan and primarily of Pittman. It was McNally who proffered the reasons to Pittman for the interrogations, i.e., the reevaluation of the justification for Cryan's discharge. He did not ask Pittman anything beyond the time, place, and duration of Bennett's solicitation. He limited his inquiry as to only whether there were conversations during work hours and the duration of the conversations. In this context, I cannot find that Respondent is culpable for McNally's noncoercive interrogations of either Pittman or Cryan, even assuming the total accuracy of the General Counsel's witnesses. However, by that presence, Van Horn acquired acute awareness of union activity, the nature of which he had earlier threatened Fischer and of which he had been instructed to investigate in a purportedly noncoercive manner. McNally testified that although he discussed the recruitment problem

with Van Horn, that Van Horn expressed more concern about the union solicitation.

It is McNally's subsequent complaint to Respondent of Bennett's conduct that is Respondent's proffered reason for the discharge of Gordon Bennett. The specific complaint that McNally made to Respondent, however, is profoundly contradicted by or inconsistent with Respondent's witnesses McNally and John Alterman.

There is no basis to discredit McNally's testimony as to his past problems with Respondent and his concern for the loss of able dockworkers. As Sidney Alterman had testified in the representation hearing, although qualified drivers are not easily obtained, the larger recruitment problem at the expanded Bridgeport operation was anticipated to be a shortage of competent dockworkers. That shortage was expected to be so grave that he planned to utilize drivers for some loading and unloading functions. Thus nonavailability of competent dockworkers motivated McNally's complaint to Respondent.

McNally testified, without contradiction that shortly after the Cryan-Pittman interviews, which he supplemented with unspecified further England employee interviews, he engaged in a long distance joint telephone conference call with Sidney Alterman, John Alterman, and Rick Alterman, John's brother, in Opa Locka wherein amidst, ''a lot of hollering'' he made his complaint. However, McNally testified further that he forcefully reminded the Altermans that Respondent was a tenant on sufferance, that McNally needed all his dockworkers, that he could easily supplant Respondent with a prospective tenant who was awaiting Respondent's immediate departure, that Bennett's recruitment of his personnel was ''totally contrary to our continued agreement,'' and that he hotly demanded that Bennett be taken off the dock where he worked along with England employees, but that Respondent could ''put [Bennett] wherever you want, [but] not in our facility.''

Sidney Alterman's testimony is conspicuous by its failure to refer to the decision to discharge Bennett, which was characterized by John Alterman as a collective decision made by himself, his brother Rick, and his father, Sidney Alterman. Rick Alterman did not testify. Neither did Frank Van Horn testify about Bennett's discharge nor the circumstances of it, although he was called to testify on other matters and had been intimately involved with the discharge.

John Alterman acknowledged participation in a telephone conversation with McNally. He testified in direct examination that McNally telephoned him to complain that Bennett was disrupting his work force, disrupting the flow of work and interfering with his operations by recruiting his workers during the performance of their duties.'' As noted above, McNally limited his complaint in the telephone call to the Altermans' breach of the nonrecruiting agreement. He made no reference in his complaint to any disruption in work, as indeed, from his own testimony, there appears to have been no significant impact on actual performance of work by any England employee by Bennett of any precise description. McNally testified that his immediate concern was the attempted recruitment and that is what he initially complained about to Van Horn. It is clear that from his direct testimony, his complaint was the recruitment of his employees. Only in cross-examination did he refer to earlier general reports from supervisors that ''Alterman'' employees were interrupting the work flow. He could not recall whether Bennett had been named to him.

John Alterman testified that his response to McNally was that ''because of the current union organization going on at'' Burlington, he would have to consult Respondent's labor attorney. John Alterman admitted in direct examination that McNally further explained that the recruitment of England employees related to Bennett's solicitation on behalf of ''Local 500.'' J. Alterman testified that before any action was taken, Respondent ''wanted to be absolutely certain as we could possibly be'' about Bennett's ''interference with England's employees.'' In cross-examination, however, J. Alterman retracted and then claimed that McNally made no specific reference to ''Local 500'' in his complaining telephone call. Embellishing on this stark contradiction, he testified:

> As a matter of fact, I do not think even think, to this day, I have even heard the word Local 500, come out of his lips.
>
> He may have said it to somebody else, but not to me.

Despite the equivocation by J. Alterman, Respondent's agent, Van Horn, had been intimately involved in and apprised of the nature of the alleged recruitment by Bennett and its intertwinement with solicitation for the Union.

J. Alterman went on further in cross-examination to insist that McNally's complaint was that Bennett interfered with the work performance of McNally's employees. He then testified ''I was reluctant to consent, to agree, to what I had done twice before with him [and I told McNally] I will order my workers to completely cease recruitment activities with your workers immediately.'' Thus, it was in early cross-examination that J. Alterman implied that McNally was complaining about recruitment instead or in addition to disruption of work. However, he quickly amended this response by testifying:

> We fired Mr. Bennett for interfering with the course of work on sharing his dock [sic], at the behest of Mr. McNally, after he *did* an investigation involving some of our people, as well as his own people.

J. Alterman insisted in cross-examination that Bennett was not discharged simply because McNally demanded his removal from the site pursuant to a no-recruiting agreement. He explained: ''The Altermans do not like to fall down on their hands and knees, and abide anybody's insistence.'' J. Alterman also testified that McNally requested not explicit discharge of Bennett but removal from England's dockers because of disruption of work, which Respondent verified. He testified, ''Through *our interviews*, with our employees, and he conducted interviews, and we did, ultimately terminate him for that reason.'' In further cross-examination, J. Alterman testified in response to the court's inquiry as to whether the breach of the nonrecruitment agreement was the premise for the discharge. John Alterman testified that McNally indeed was ''concerned that . . . for the third time his employees were being recruited by one of our employees'' and that Respondent was in a vulnerable position as a tenant by sufferance, and indeed it was not simply a matter of disruption of work flow. In further elucidation to the

court, J. Alterman went on to describe two telephone complaints made to him by McNally, in contradiction to McNally's testimony as to a single joint telephone call. Now J. Alterman testified that in the first telephone call McNally made no complaint whatsoever of alleged employment recruitment by Bennett of England employees but limited his complaint to work flow disruptions and made no suggestion of any relationship to union organizing efforts. J. Alterman then testified that it was in that first telephone call that he suggested to McNally that McNally investigate the matter. The sequence of events described by J. Alterman at this point in his testimony is starkly inconsistent with McNally as well as the thrust of Alterman's foregoing testimony. In any event, J. Alterman admitted receiving a full report of Bennett's activities from Van Horn after which the recruitment issue was first raised. According to Alterman, Van Horn, at his orders, had investigated Bennett's activities and, on his report but primarily on McNally's ''confirmation,'' the termination decision was made. He retracted this testimony somewhat by testifying that he could not testify that he actually read any of Van Horn's purported notes of interviews with employees.

In redirect examination, J. Alterman testified that it was in the first telephone call with McNally that the latter demanded Bennett's removal from the job. Alterman further embellished his testimony by adding that McNally not only asked for Bennett's removal from the England dock but also demanded his discharge from employment, clearly a contradiction of McNally's testimony. J. Alterman's final statement of Respondent's motivation for the discharge of Bennett was for: ''disrupting work on C. R. England's dock.'' He placed McNally's first telephone call as November 12 or 13, the investigating interviews as the same or next day, and the discharge decision as having been made on the morning of November 14. J. Alterman's final word in testimony is that Bennett was not discharged because of a complaint of McNally but rather because Respondent's investigation verified that complaint, i.e., disruption of work on the dock by Bennett. John Alterman's testimony is thus revealed to be internally inconsistent and inconsistent, if not contradictory, with McNally's testimony. Furthermore, according to John Alterman, Bennett was discharged for the disruption of work by England employees. The record contains insufficient evidence of any significant disruption of work. Van Horn failed to testify, and there is no probative evidence of any other investigation by Van Horn other than the interviews of Cryan and Pittman. McNally's testimony reveals that his complaint was that of recruitment, not of any significant disruption of work by Bennett.

The General Counsel has established Respondent's deep-seated, historical opposition to union representation of its employees manifested in forms of unlawful as well as lawful conduct. Bennett was known to be a union activist. Despite his position as a potential supervisor and valued status as a skilled lead loader, of whom there was to be an anticipated shortage of at a then-expected imminent new terminal, he was permanently discharged on disclosure of his union activities even though McNally, according to his more credible testimony, did not even request it. The testimony of Respondent's witnesses proffered for the motivation of the discharge is inconsistent and/or contradictory. The motivation cited by Respondent's decision, disruption of work, has not been demonstrated by probative evidence. Nor was there any reasonable basis for Respondent to believe it occurred.

I must find that the General Counsel has sustained the burden of proving that Bennett was discharged, in part if not in whole, because of his union activities and that Respondent has not sustained the burden of showing that Bennett would have been discharged even in the absence of those protected activities. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

K. *Reduction of Work and Constructive Discharge*

It is not disputed that 1 week after the November 5 filing of the representation petition the assignment of work hours to the drivers and warehouse employees suffered a sharp, precipitous decline. The driving assignments remained at a depressed level and impacted the earnings of the drivers to the extent that Rease and Tablas notified Respondent that they could not afford to remain under its employ unless their earnings were restored. Tablas and Rease unilaterally were forced to seek other employment on February 8 and March 16, respectively.

The General Counsel alleges that the reduction in driving assignments was an act of discriminatory retaliation calculated to coerce the employees to abandon their union support, or to force the prounion local drivers out of the terminal. The General Counsel adduced evidence as to post-November 5 instances of local driver inactivity at times when over-the-road drivers performed local pickups and deliveries to customers previously serviced by the local drivers.

Concurrent with the ongoing local drivers' complaints about their reduction of driving assignments, Respondent continued manifesting its hostility to the Union. The Board-conducted election, now deferred to this litigation, was being processed. On May 5, according to Fischer's unobjected to and more credible testimony, he engaged Van Horn in another discussion as to the reduction in driving assignments and a pay raise he had expected but not received. Van Horn answered that Respondent would not give him a pay raise in the face of a pending election petition. (There is no complaint allegation as to the pay raise issue and the circumstances of its deferral was not litigated.) With respect to the depressed work hours, Fischer told Van Horn that it was Ojeda's opinion that after August 7 (the expected election date) everything will return to normal, i.e., the lost assignments would be restored. Van Horn responded that it would not and, further, if Respondent lost the election that it would ''drag it out some more.'' They then discussed the election and the Union's fear that Respondent might try to utilize temporary employees to pack the ballot box. Fischer said he would be a union observer, and he intended to challenge any temporary employee who attempted to vote. Van Horn told him that by being an observer Fischer placed himself in a vulnerable position and reminded him that the Union did not pay his mortgage or put food on his table. Van Horn then warned him to use his ''discretion'' as to volunteering to be the Union's observer. Thus, Van Horn continued to threaten retaliation for union activity in the context of the discussion of reduced worktime and implied that the reduction in assignments were punitive. I discredit Van Horn's generalized categorical denials. Although not alleged, this conduct is violative of Section 8(a)(1) of the Act and constitutes further

implication to an employee that the reduced driving assignments are the result of their union activities.

The Respondent herein has reduced the driving hours of the Burlington local drivers almost immediately on learning of their union activities. The drastic downturn in work came at a time when Respondent was claiming that a five local driver unit was not appropriate because even such a small unit was ''expanding.'' The representation hearing record discloses at least three different scenarios of the employment level of local drivers to be imminent upon the then soon expected move to Bridgeport. Sidney Alterman provided a shifting and inconsistent prognosis of expected local driver employment levels. The precipitous drop in work assigned to the five pro-union local drivers and dock loaders was accompanied by a display of animosity to union representation inclusive of interrogations and explicit and implicit threats. By the conduct of dispatcher Lee and the conduct of Manager Van Horn, Respondent gave a calculated impression to the drivers that the reduction in work was retaliatory. Simultaneously, one of the more visible union adherents was discharged for clearly pretextual reasons. Against the foregoing background, non-Burlington drivers were observed in driving assignments previously undertaken by the alleged discriminatees. The evidence thus constituted raises a very strong prima facie showing that Respondent, for retaliatory nonbusiness reasons, depressed the work assigned to the local drivers and dock loaders. As Sidney Alterman had testified at one point in the representation petition, an increase of work could be absorbed by Respondent at Bridgeport with fewer local drivers by adopting means of delivery and driver compensation not utilized at Burlington. He suggested that Respondent throughout its system had a variety of means of moving the higher tonnage with fewer drivers. The burden of proof shifts to Respondent. *Wright Line*, supra. Indeed, it is a heavy burden within the context of the foregoing evidence to prove that the hours of the work drivers would necessarily have been reduced in the specific amounts actually reduced for the local drivers because of economic reasons, regardless of their union activities. The massive evidence marshalled against Respondent in this case behooves it to prove with precise, probative, convincing testimony and specific documentation that the Burlington employees' loss of hours was attributed to clear, specific economic factors. This is particularly so given the vulnerability of the credibility of its witnesses and the enigmatic, shifting testimony of Sidney Alterman in the representation petition and his vague, generalized references to a ''loss of business'' in both cases.

Sidney Alterman's testimony and that of Operations Manager William Culberson make passing reference on cross-examination to certain customers who cancelled orders. Some of those businesses clearly are only of peripheral significance to Respondent's overall business. No data was produced to reveal the precise tonnage loss for any specific customers. No business records were produced to reveal the precise financial status or volume sales for either the Burlington terminal nor any other terminal. No records were proffered that might have provided comparative data either between terminals or as to seasonal fluctuations. No precise information was adduced by Respondent that might demonstrate why Respondent's glowing economic expectations had suddenly soured. Clearly the aberration was localized, as Sidney Alterman admitted that Respondent's overall operations for November were ''very good.''

Respondent's economic defense rests on its assertion that documentary evidence reveals that the tonnage into and out of the Burlington terminal jurisdiction for the relevant time period conclusively shows a uniform reduction of driving assignments for all drivers, i.e., Burlington hourly drivers and non-Burlington over-the-road drivers servicing the area.

It is admitted that nonhourly paid drivers on occasion in the past had been assigned local pickup and delivery in conjunction with work that brought them into the Burlington terminal jurisdiction. However, it is clear from dispatcher Lee's pretrial affidavit that he always looked first to available local hourly drivers for local service. In his unconvincing, often leading examination by Respondent counsel, which I do not find credible, he sought to mitigate his affidavit testimony by referring to circumstances where this policy was not always followed. However, neither he nor Culberson, when examined in reference to instances after November 5 of local service by road drivers, could with any precision explain what specific factors compelled the deviation from general practice. Rather, the answers were laden with such qualifications as ''probably,'' ''maybe'' and ''might.''

Respondent's documentation of the actual status of post-November tonnage picked up and delivered in the Burlington jurisdiction would have been of some probative force had it established clearly and convincingly the exact inflow and outflow of all such tonnage by all possible means. Given Sidney Alterman's representation case testimony that Respondent had various means of moving increased local tonnage with fewer drivers, the actual documentation relied on by Respondent must be scrutinized with the utmost caution and suspicion.

Respondent did not adduce delivery manifests that would have documented all deliveries in the Burlington jurisdiction whether it be dispatched from Burlington, Hackensack, Charlotte, Winterhaven, Pittsburgh, or any of its 18 terminals. The delivery documentation (MDE forms) adduced by Respondent, and upon which it relied for its summarizations and analysis, admittedly referred to service runs of nonhourly paid drivers, whereas Alterman and Culberson admitted that mileage paid drivers were often paid hourly rates when engaged in local service. Thus, there is no documentation of the number of over-the-road drivers who made local delivery service on an hourly compensation basis. Similarly, the pickup documentation (D-10 forms) would have disclosed all possible pickups had they been all adduced. Culberson admitted, however, that all were not necessarily produced. He testified that at best the ''greater majority of pickups will have a corresponding D-10 [documentation].''

Because of the confusing morass of shipping records, the complexity of recorded data and the admitted flexibility of the ability to move larger tonnage with fewer drivers where, according to Sidney Alterman, Respondent has a will to do so, even the limited documentation of all possible local service by all possible drivers would have required a convincing, irrefutable, highly credibly foundation. Respondent's unlawful coercion of its employees, inclusive of the discharging of a valued lead loader to the detriment of its own economic self-interest demands, such a rigorous test. Respondent's lack of veracity as to its motivations with respect to that discharge and other areas of its low credibility reinforce that conclu-

sion. However, Respondent has failed to adduce even that level of documentation. Accordingly, I conclude that Respondent has failed to sustain its burden of proof, and I find that it reduced the driving assignments and consequently the income of its local hourly paid drivers and dock loaders for unlawful retaliatory motivations in violation of Section 8(a)(1) and (3) of the Act. I further find that Respondent engaged in that conduct with the awareness and expectation that it would force the termination of at least two more prounion employees, Tablas and Rease. I find that the reduction in income effectuated by Respondent is sufficient to constitute such onerous conditions as to effectuate a constructive discharge in violation of Section 8(a)(1) and (3) of the Act as alleged in the complaint.

CONCLUSIONS OF LAW

1. As found above, Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

2. As found above, the Respondent, at its former Burlington terminal, violated Section 8(a)(1) of the Act by coercively interrogating employees about their union activities, by threatening them with discharge and other unspecified reprisals because of their union activities, and by directly or indirectly telling employees that their work hours were reduced because of their union activities.

3. As found above, Respondent, at its former Burlington terminal, violated Section 8(a)(1) and (3) of the Act by discharging employee Gordon Bennett on November 14, 1990; and by on and after November 5, 1990, reducing the work hours of its hourly paid drivers and dock loaders and thereby causing the constructive discharge of employees Richard Tablas on February 8, 1991, and Perry Rease on March 16, 1991, because of the employees' support and assistance on behalf of the Union.

4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that Respondent unlawfully discharged employees Gordon Bennett, Richard Tablas, and Perry Rease and reduced the work hours of its Burlington hourly drivers and dock loaders, I shall recommend that Respondent be ordered to offer those discharged employees immediate and full reinstatement to their former positions or, if those positions no longer exists, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and to make them and all its Burlington hourly paid drivers and dock loaders whole for any loss of earnings suffered as a result of its unlawful conduct by payment of a sum equal to that which they would have earned absent the discrimination, with the backpay and interest computed in accordance with the formula set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall also recommend that any reference to the terminations be expunged from their employment records.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Alterman Transport Lines, Inc., Burlington, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees as to union sympathies and activities.

(b) Threatening employees with discharge or unspecified reprisals because of their union activities.

(c) Telling employees directly or indirectly that their work hours were reduced because of their union activities.

(d) Discharging employees or reducing the work hours of employees because of their activities on behalf of Food Drivers, Helpers and Warehousemen Employees Local 500 a/w International Brotherhood of Teamsters, AFL–CIO.

In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer those employees whom it unlawfully discharged, Gordon Bennett, Richard Tablas, and Perry Rease, immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them and all Burlington terminal hourly paid drivers and dock loaders whose work hours were unlawfully reduced whole for any loss of earnings suffered as a result of its unlawful conduct in the manner set forth in the remedy section of this decision, and expunge any reference of the discharge from the work record of Gordon Bennett.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other

(c) Post at its Bridgeport, New Jersey terminal copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that all allegations in the complaint not found violative of the Act in this decision are dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT coercively interrogate employees as to union sympathies and activities.

WE WILL NOT threaten employees with discharge or unspecified reprisals because of their union activities.

WE WILL NOT tell employees directly or indirectly that their work hours were reduced because of their union activities.

WE WILL NOT discharge employees or reduce the work hours of employees because of their activities on behalf of Food Drivers, Helpers and Warehousemen Employees Local 500 a/w International Brotherhood of Teamsters, AFL–CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL offer those employees whom we unlawfully discharged, Gordon Bennett, Richard Tablas, and Perry Rease, immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and make them and all Burlington terminal hourly paid drivers and dock loaders whose work hours were unlawfully reduced whole for any loss of earnings suffered as a result of our unlawful conduct, and expunge any reference of the discharge from the work record of Gordon Bennett.

ALTERMAN TRANSPORT LINES, INC.